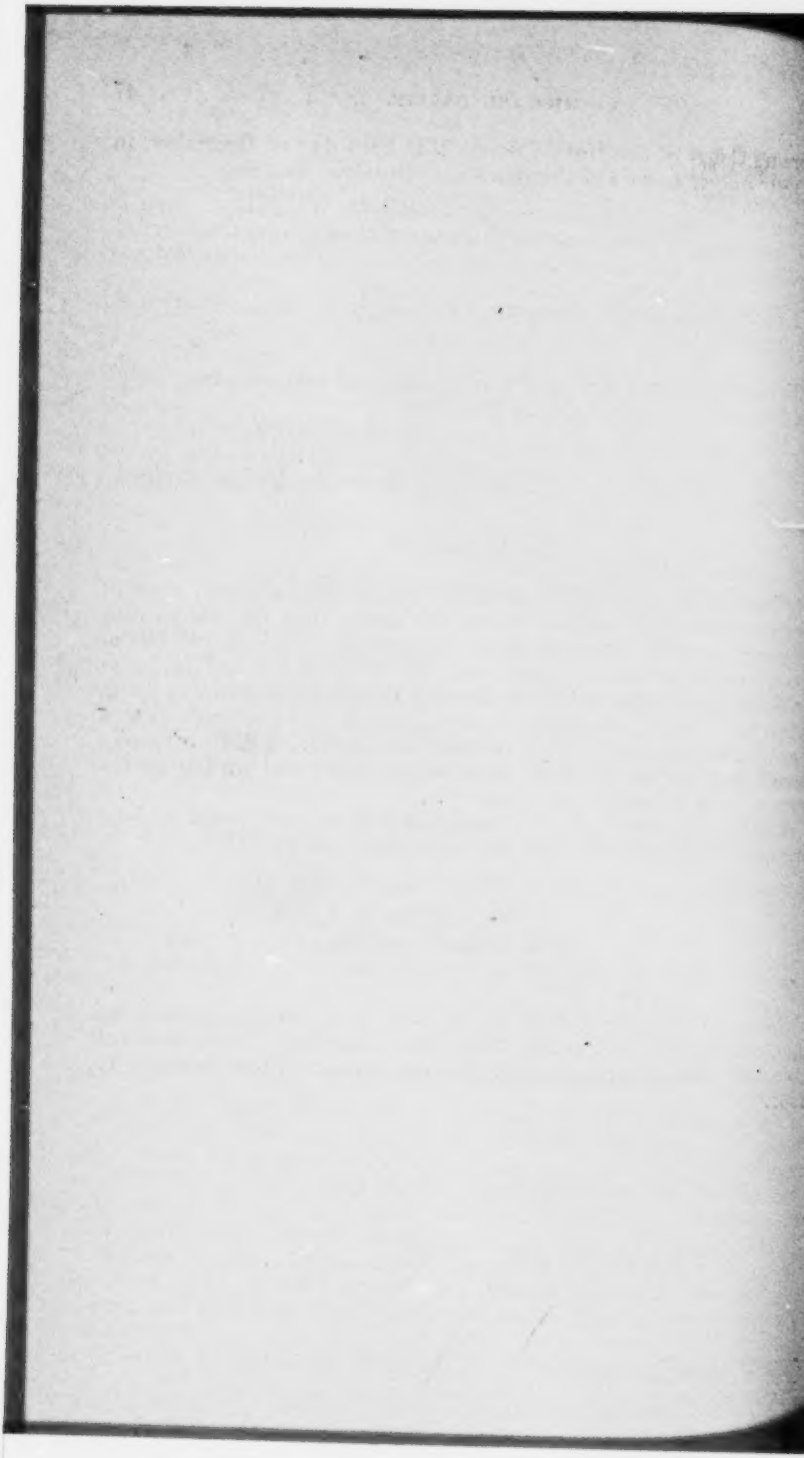

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 322.

FILED
MAR 12 1906
JAMES H. McKENNEY,
Clerk.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MICHAEL CARLIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

S. C. Herriman, Walker and Comer, Printers, N. Y.

25827

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. MICHAEL CARLIN.	No. 222.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was brought in the Circuit Court of the United States for the Northern District of Texas, December 10th, 1900, by Michael Carlin for damages for injuries sustained by him while a member of a "bridge gang" engaged in repairing a bridge on a line of the defendant Railway Company on the day of September, eighteen hundred and ninety-eight, sustained, as he alleges, on account of the negligence of the defendant.

The testimony shows that the "gang" under the superintendence of the foreman, one Welsh, in repairing the top of the bridge, were directed by the foreman to perform other duties, which called them away

from the bridge. One of them, probably Carver, left a maul or hammer, weighing about six or eight pounds upon the bridge. The plaintiff proceeded tothe main land, and was preparing to file a saw at a point some distance from the track, and about thirty or forty feet from the end of the bridge when the accident occurred. It appears that the foreman was the only man on the bridge when the freight train approached from the West. He testified that he looked for obstructions on the bridge, but saw none. After the train had passed it was found that the maul or hammer had struck plaintiff, the handle being broken off, and caused injuries which rendered necessary the amputation of his leg below the knee. The plaintiff alleged several acts of negligence, none of which were pressed at the trial, excepting the leaving of the maul or hammer upon the bridge, and the failure of the foreman to see and to remove it.

Defendant demurred ; pleaded specially that the alleged acts of defendant were not the proximate cause of the injuries ; pleaded the general issue ; pleaded specially that the negligence, if any, was that of a fellow servant of plaintiff ; that plaintiff was guilty of contributory negligence and that he had assumed the risks of his occupation (Tr., p. 6).

The jury rendered a verdict for the plaintiff in the sum of six thousand dollars ($6,000), for which sum judgment was duly entered.

Upon a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed ; from which judgment of affirmance defendant has taken out a writ of error to this Honorable Court.

Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment, affirming the judgment of the Circuit Court for the Northern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in the second paragraph of the Court's charge, wherein the Court, in defining negligence, instructed the jury as follows :

" Or in other words, negligence consists in omitting to do something which an ordinary prudent man would not omit, and in doing something which an ordinary prudent man would do under similar circumstances."

III.

The Circuit Court of Appeals erred in its judgment in affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in the third paragraph of its charge, wherein the Court instructed the jury as follows :

" The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company."

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the

Northern District of Texas, and in holding that said Court committed no error in the fifth paragraph of the Court's charge, wherein the Court instructed the jury as follows:

"If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which directly and approximately contributed to the injury of the plaintiff, then and in that event it would be your duty to find for the defendant."

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury are instructed that, under the law and evidence, a plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running, or the fact that the bridge foreman did not have any flags out on that occasion and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul, was negligence; that is he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

"They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is, when it is more likely to follow this supposed cause than it is to fail to follow it.

"Bearing in mind the above definitions, the Court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances then in such event, the foreman in failing to discover the proximity of the hammer, would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for the defendant."

VIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

The Court instructs the jury that the burden of proof is upon the plaintiff to show negligence, and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for defendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"Although Welch, the bridge foreman, may have been in law the representative of the company, yet if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty—may be expected to be performed by any one of the men irrespective of his grade or rank—that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welch in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welch in this respect, if any there were."

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then in such event the jury should bring in a verdict for the defendant."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of the witness Ed. Carroll who was asked what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges, and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions

when a train approaches, to which question the plaintiff in error objected as calling for a conclusion and opinion of the witness and not a fact, to which question the witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags.

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of Ed. Carroll who was asked what was his duty with reference to seeing that a bridge was clear, to which the plaintiff in error objected as calling for a conclusion, and opinion of the witness and not a fact, to which question the witness answered that it would be the same thing; that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

XV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was against the evidence, for the reason that it appeared from the evidence that the servants of the plaintiff in error had exercised due care to discover any danger or any obstruction on the track.

XVI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court Committed no error in refusing to hold that the verdict of the jury was contrary to the evidence, because it appeared that if there was any evidence at all, that it was the negligence of a fellow servant of defendant in error.

XVII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was contrary to the law and the evidence, in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track, was not the proximate and direct cause of the accident.

XVIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, and in holding that said Court committed no error in refusing to hold that the verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the the negligence of Ed. Carver in leaving the hammer on the track, and plaintiff in error could not have reasonably anticipated that such would have been done.

BRIEF.

I.

The negligence of the Railway Company, if any, was that of a fellow-servant for which it is not liable.

We invite the Court's attention to the tenth assignment of error presented herein, which complained of the refusal of the Court to give a special charge as follows: "Although Welsh, a bridge foreman, may have been in law the representative of the company, yet if they find that the act of examining the track as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty which might be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say by the foreman and men alike, as occasion and circumstances might require, then in such event the act or duty of Welsh in this respect was one which existed between fellow servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were" (Tr., p. 28), and the third assignment of error (Tr., p. 40), which complained of the error in the third paragraph of the Court's charge, wherein the Court instructed the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

These assignments raise the question as to whether the railroad company was liable by reason of the alleged negligent acts of Welsh, bridge foreman, without reference to the capacity in which he was acting at the time the alleged negligence occurred. In consideration of

these assignments, we call the attention of the Court to these statutes of Texas:

"Art. 4560*f*. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employe of such person, receiver or corporation, and the fact that such servant or employes were fellow-servants with each other shall not impair or destroy such liability.

"Art. 4560*g*. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this State, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employes of such person, receiver or corporation, or with the authority to direct any other employe in the performance of any duty of such employe are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employes.

"Art. 4560*h*. All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow-servants."

Sayles' Civil Statutes of Texas, 1897, Arts. 4560*f*, 4560*g*, 4560*h*.

In the opinion rendered by the Circuit Court of Appeals in this case, it was said:

"It is clear that, on the proof, Welsh was in control and command of the plaintiff, and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of

work or service. Under the Texas statute, according to its letter, or as construed by the Texas Supreme Court, they were not fellow-servants (Long v. Chicago, R. I. & T. R. R. Co. (Supreme Court of Texas), 57 S. W. Rep., 802; Nix v. Texas and Pacific Railway Co., 18 S. W. Rep., 571)."

An examination of the case of Long vs. Chicago, R. I. & T. R. R. Co. shows that the question whether a foreman is at all times a vice-principal, or according to his employment may be a fellow-servant with those under him, was not involved and was not discussed. The question decided was whether a section-hand returning from work to the tool house to place his tools therein was a fellow-servant with other section-men engaged in carrying tools to the same house on a hand-car. The case of Nix vs. Texas and Pacific Railway Co., cited by the Court, was decided in December, 1891, before the articles above quoted were enacted in their present form which was in 1897. It was there held that "the power of such servant or agent to employ and discharge servants engaged with him in the same work will not alone constitute him the master, but where he has such power as foreman of the work being done over servants working under him, subject to his direction, his position is that of the master and the master would be liable for his negligence causing injury to such servants;" and the Court held that an instruction to the jury that the foreman would be a fellow-servant of a subordinate if he had authority to employ and discharge him, was misleading unless the Court proceeded to instruct them in the same connection, that, if the foreman had such power and also the power to direct and control the subordinate in his work, they would not be fellow-servants, but that the foreman would be the master.

It thus appears that the cases cited *supra* in the opinion of the Circuit Court of Appeals are inapplicable to the present case.

The first of these articles (4560*f*) renders railway companies liable for damages sustained by a servant "while engaged in the work of operating the cars, locomotives or trains" of such railway by reason of the negligence of any other servant, and provides that the fact that such servants were fellow-servants with each other shall not impair or destroy such liability. This article does not apply to the case at bar, because the plaintiff and his fellow-servants were not engaged in the work of operating cars, locomotives or trains.

It will be observed that the other two articles (4560*g* and 4560*h*) do not change the old rule as to the liability of a principal for damages to an employee caused by the negligence of a fellow-servant. They direct that the persons intrusted with the superintendence, control or command of other servants or employees shall be considered vice-principals, and not fellow-servants with their co-employees, and also define who are to be considered fellow-servants in the State of Texas.

If the negligence which caused the accident to the plaintiff was the leaving of the maul or hammer upon the bridge by one of the bridge gang, not the foreman, it was that of a fellow-servant, for which under these statutes and the law as it existed prior to their enactment the railway company was not liable. If, however, the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, the question arises whether the foreman neglected to perform a duty

peculiar to him as foreman, and which was specially imposed upon him as such foreman, within the meaning of Article 4560*g*, *supra* ; or whether it was a duty resting equally upon all the members of the bridge gang.

It is a well-known fact to this Court that the doctrine of fellow servant on the question as to when a certain person should be declared vice-principal or not is one upon which different constructions have been placed by various Courts, and it very frequently depended upon the forum as to how the issue should be determined. It seems to us that the only intention of the Legislature was to definitely determine just when such persons were vice-principals, and not in any way to assert that the company was at all times liable for the negligent acts of such vice-principal without regard to the character of the act he was performing. In the first of the articles above quoted (4650*f*) the company is specifically made liable for the negligence of one servant resulting in injury to another, while in the second (4560*g*), which defines the status of the vice-principal, this provision is omitted. This fact certainly justifies the conclusion that the Legislature intended to leave this question to be determined by the application of general law.

Granting that under the provisions of the Texas statute, Welsh was at the time the vice-principal of the company, yet we insist *(a)* that it is a well-established proposition of general law that, while a servant may be a vice-principal of a company, yet if the negligent act, which is complained of against him, arises in the performance of one of the duties of a mere servant, which might or could be performed by any co-employee, then the negligence was not that of a vice-principal but that

of a fellow servant. And we also insist *(b)* that Article 4560*g*, *supra*, does not cover the case at bar, for the alleged injury to the plaintiff did not result from any wrongful act of the alleged vice-principal arising out of his "superintendence, control, command or direction" of the plaintiff "in the performance of any duty of the plaintiff." The plaintiff's case is clearly outside of the statute, and the Court erred in not so holding as requested by the defendant, and in holding the contrary in its charge to the jury.

The plaintiff's witness, Carroll, testified under objection by the defendant (Tr., p. 12) that it was the duty of the foreman "to see that there was no obstruction and to see that it [the bridge] was clear at all times unless he had flags out." On cross-examination he was asked, "Then you would not rely, when working on a bridge, on the foreman to see if it was clear all the time," to which he answered, "No, sir; and if I was foreman, I would not rely on the men all the time." He was then asked, "You would rely on each other," to which he answered, "Yes, sir." Plaintiff's witness, Nichols, testified on direct examination (Tr., p. 12) in answer to the question, "What was the duty of the foreman with reference to seeing that the bridge was clear?" as follows: "It was every one's duty, each man was to clear up the bridge when the train was coming, and it was the foreman's duty to give orders and he was supposed to give orders and see that the track was cleared up." He also said that it was the foreman's duty to see that it was cleared up. On cross-examination (Tr., p. 15) he was asked if the foreman had to see that the work was being done right all the time, to which he answered, "No, not necessarily, but he could stand up above and give his orders

as well as not, but did not do that all the time." He also said that the men were supposed to clear everything safe, that the foreman was supposed to see that they did it. The plaintiff on direct examination (Tr., p. 17) said that it was the duty of the bridge foreman to see that the track on the bridge was clear and nothing on it, if the train was seen approaching. On cross-examination (Tr., p. 18) in answer to a question by the Court as to whether it is the duty of men on the bridge to see that the track is clear for a coming train, he said, that it is their duty.

Aside from this testimony, we claim that the duty of giving warning of, and of preventing, an approaching danger to any one exposed to it, is one which is imposed upon all persons however related to the person endangered, and even upon strangers. We further contend that the mere fact that the foreman was the only person who happened at the time to be upon the bridge cannot make the railway company liable for negligence of a duty, which was impressed upon all the members of the gang, and was not peculiarly one imposed upon him as foreman. Were it otherwise, the liability of this defendant would be made to depend upon the chance of a fellow workman or the foreman being on the bridge at the time. This proposition is sustained by well-adjudged cases. The question is preserved in the tenth assignment of error (*Ante*, p. 6).

In *Quinn vs. New Jersey Lighterage Co., 23 Fed. Rep., 363*, the captain of a barge was assisting a subordinate in doing work, which was not particularly his own as captain.

Judge WALLACE of the Second Circuit said:

"The question here is not whether the defendant is liable to a subordinate employe for the negligent act of

the captain in the discharge of his duty, but whether the defendant is liable for the negligence of the captain, not as a captain, but as a subordinate employe. The true inquiry in this case is whether the character of the act of the captain was one which was incumbent upon the defendant to see properly performed. This is the rule of Crispin vs. Babbit, 81 N. Y., 516, where it was held that the liability of a master for an injury to an employe occasioned by the negligence of another employe, does not depend on the grade or rank of the latter, but upon the character of the act in the performance of which the injury arose."

The Court cites the case of Hoke vs. St. Louis Ry. Co., 11 Mo. Appeals, where the following language was used:

"But just as the tortious act of a servant to make the employer liable must pertain to the particular duties of that employment, so the wrongful act of a vice-principal or *alter ego* must be an act done by him as vice-principal. The fact that he is vice-principal in one department of the business does not make all his acts the acts of a vice-principal."

Judge WALLACE proceeds:

"Applying the rule to the present case where the captain of the barge was not performing a captain's duty while working at the tongs, but that of a common laborer, his negligence was not that of a vice-principal, but of a co-laborer. If he had directed any of the men assisting the plaintiff to do that particular part of the work which he undertook to do himself, as he might have done if he had seen fit, and the plaintiff had been injured by the fault of the one thus selected, the defendant would not have been liable, in the absence of proof that the captain had selected an incompetent man for the place. The plaintiff has no more ground of complaint than he would have had if he had been injured by the carelessness of any of his fellow laborers. It was the act of a co-servant, and among the risks incident to the employment which the plaintiff impliedly assumed when he engaged in the work. The captain exercised no more control over him than did the other laborers."

This decision was followed in Olsen vs. Oregon Coal & Nav. Co., 104 Fed. Rep., 475 ; The Kensington, 91 Fed. Rep., 681 ; The Miami, 93 Fed. Rep., 219.

The case of Stockmeyer vs. Reed, 55 Fed. Rep., 259, sustains the same principle.

In the more recent case of Illinois Central Ry. vs. Bolton, 9 A. & E. R. R., Cases (new series), 868, the Supreme Court of Tennessee very clearly draws the distinction, saying :

" It is apparent that one may be the general representative of a master, so as to charge the latter for the results of all negligence occurring within the scope of his employment, yet he may abandon his position of superior with the authority attached to it, and become a fellow-servant of those engaged in doing the work on hand and on a plane of perfect equality with them. In the one case the master would be responsible for his negligence ; in the other we think he would not be."

Quoting from Buswell in his work on personal injuries, 387, where this author discusses the doctrine of vice-principal :

" It is settled that a person who is in some things the mere servant may still be the agent of the master to perform other duties primarily personal to the master. On the other hand, if a workman charged in some direction with the duty of superintendence, does the negligent act complained of, not as superintendent, but in his capacity of fellow servant of the plaintiff, the master will not be liable for such negligent act."

By the evidence in this case, it appears that the duty rested upon all members of the bridge gang who might be upon the bridge, to look for and remove any obstructions when a train was approaching, and under the principles announced by the above authorities, it is clear that if Welsh, the foreman, was negligent in performing a duty which was equally the duty of those under him, his negligence in this respect would

be the negligence of a fellow servant and not that of vice-principal, for which the railway company would not be responsible.

Moreover we insist that the plaintiff's case is not within Article 4560*g*, *supra*, for the reasons above stated under Subdivision *(b)*, *supra*.

II.

There was no evidence of the negligence of the foreman in failing to discover the maul or hammer upon the bridge sufficient to warrant the jury to find a verdict for the plaintiff.

This question was saved by the fifteenth assignment of error and by exceptions to the charge of the Court and to its refusals to charge *(ante*, p. 8).

Under the charge of the Court and under the facts in this case, if any recovery can be had at all, it must be based solely upon the fact that the foreman failed to discover the sledge hammer or maul upon the bridge and to remove it therefrom. The only testimony upon this point is that of George Welsh, the foreman, who testified (Tr., p. 20) that he was about the middle of the first span when he saw the train coming; that he looked up and down the track to see if everything was clear; that he did not see anything, and stepped to one side when the train was three or four hundred yards from him; that he would have had plenty of time, if there had been anything on the bridge, to have gotten it off.

There is no testimony whatever to show where the hammer actually was, or that the foreman could have seen it. There is no evidence that the foreman was near-sighted or was otherwise incompetent to discover the hammer or maul if it was visible. The testimony is that he looked along the track for impediments and found none, therebyperforming his full duty. So far as the testimony goes, he did all that could be done under the circumstances to see if the track was clear. Welsh's testimony was not contradicted or attempted to be; and no evidence was offered in rebuttal, or attempted to be, and there was no attempt to contradict or impeach or discredit Welsh's evidence.

In order to reach a verdict for plaintiff the jury must have assumed that the hammer could have been seen and removed ; that the testimony of Welsh, which was not impeached or contradicted, that he looked for obstructions and failed to see any was untrue. No Court or jury had the right so to assume. That the train did strike the hammer is a reasonable deduction from the fact that it was thrown in the direction in which the train was going, but that it was in such a position as to convict the foreman of negligence in not discovering it was disproved by the uncontradicted testimony.

We respectfully submit that a jury is not justified in finding a verdict based upon assumptions, and that it could not have reached its verdict in this case without having assumed facts which were not only not proved, but disproved by the uncontradicted evidence in the case.

We call the Court's attention to the facts in this case, and submit that the bare statement of the facts brings the case within the rule, and that the peremp-

tory instruction should have been given. We take the testimony of the plaintiff himself. In September, 1898, he was working as a bridge carpenter in the service of The Texas and Pacific Railway Company, and when so working near Aledo tank bridge, he was hurt. How? A spike maul, or hammer, had been left on the bridge or track by a fellow employee, who, under the charge of the Court, was a fellow servant of the plaintiff, and a passing train is supposed to have struck the hammer, causing it to strike the plaintiff, breaking his leg. Under the charge of the Court, and under the facts in this case, if any recovery can be had at all, it must be based solely and alone upon the fact that the sledge hammer or spike maul was not discovered by the foreman in charge of the bridge gang, and if discovered by him was not removed in time to prevent the accident. Carlin testifies himself that while doing the work of the kind he was employed to do when he was injured (and he is corroborated by the other witnesses), it was not necessary to put out flags to warn trains (Tr., p. 17). Carlin further testified that the men at work are expected to look out for approaching trains (Tr., p. 17). Carlin further testified that when a man is using a tool, such as a hammer to drive spikes, he is supposed to put it out of the way when he has finished with it, and an old experienced bridgeman will do it, but it is the business of the foreman to watch a green man (Tr., p. 17). There is no proof in the record that the spike maul was handled by a green man. Carlin further testified that it was the duty of men on the bridge to see that the track is clear for a coming train (Tr., p. 18). George Welsh, foreman of the bridge gang, and to whose alleged negligence is attributed the cause of the

injury, testified that on the morning plaintiff was injured that he was about the middle of the first span of the bridge when he saw the train coming; that he looked up and down the track to see that everything was clear; that he did not see anything, and stepped to one side when the train was three or four hundred yards from him; that he would have had plenty of time if there had been anything on the bridge to have gotten it off (Tr., p. 20). That when a man is using tools and gets through with them he is supposed to put them out of the way where a train will not strike them; that the foreman is liable to be anywhere about the bridge at any time, and cannot be depended on to be at any place (Tr., p. 21).

There is not a particle of proof in the record to show where the maul was lying when it was struck, whether on the bridge or on the track, or on the side of the bridge or on the side of the track. There is not a particle of proof to show that the foreman, Welsh, could have possibly seen the hammer if it had been on the bridge, or on the track, or on the side of the bridge, or on the side of the track, there being no evidence at all as to where the hammer was located, and as to whether or not it was in a place where he could have seen it, or did see it. He states that he did not see it; that he was on the middle of the first span of the bridge when he saw the train coming, and that he looked up and down the track and did not see anything on the track; that everything was clear. He shows by his uncontradicted testimony that he did all that could be done, under the circumstances, to see that the track was clear. He had a right to suppose, and the Court recognizes this right, that parties using tools, when aware of an approaching train, would

remove them. Tools of various sizes would be used in bridge work; small hammers and big hammers, small nails and big nails, and they would be used at various parts of the work. Working on a bridge of two hundred feet, some of the tools might be in the middle of the bridge and some at each end when a train was approaching. The foreman, as the proof showed, might be working underneath the bridge; he might be working at the extreme end of the bridge, and in a position where he could not possibly see that all the tools were removed.

In other words, this record discloses the fact that the rule in matters of this kind was that each man should look after the tools with which he was working, and keep them free and clear of the track when trains were approaching; that this was his duty; that the foreman, when in a position to do so, would, to a certain extent, supervise this duty, as far as he could possibly do so, but that it was not his duty alone, and that the men working under him were aware of this fact, and expected to see that the tools were removed. This record discloses the fact that Carlin, the plaintiff herein, was fully advised of this rule; that he was expected to conform to it himself, and that he assumed the risk of his fellow-servants conforming to it. There is literally no evidence in this record to show any negligence upon the part of Welsh, the foreman, to find this hammer, or to remove it after he found it; there is no evidence showing where the hammer was, whether it was hidden from view or whether in view. There is literally no evidence upon which a jury can say that the hammer was at such a place, and that Welsh was located at such a point that he must have seen it, and neglected to remove it after seeing it. The fact that

the hammer was struck by the engine or train, and was thrown against Carlin, is not a fact, in itself, that speaks, so that the doctrine of "*res ipsa loquitur*" does not apply. The jury could only suppose a fact, and then base a supposition upon this supposed fact. They must suppose, first, that the hammer was left at a point or place on the track or bridge where the foreman could see it, and that he negligently failed to see it; that he failed to exercise ordinary care to ascertain it; that if he did ascertain it was on the track, that he failed to exercise ordinary care to remove it. All of these are pure suppositions, unsupported by any evidence. The only evidence in this case upon which the jury based their verdict is the fact that Carlin was struck by a hammer which had been struck by a passing train, and this fact cannot support the verdict, in view of the fact that, if the hammer was left where the train could strike it, it had been left there by a fellow-employee and a fellow-servant of Carlin, who assumed the risk of his negligence when he accepted employment.

The rule of this Court was announced in *Pleasants vs. Fant, 22 Wall., 116, 120.*

Justice MILLER said:

"But, as was said by this court in the case of Improvement Company v. Munson, 14 Wallace, 448, recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

We submit to the Court that there is literally no evidence upon which a verdict can be based, and that

this case comes within the purview of the rule thus pronounced by this Court.

We submit to the Court that the facts detailing the character of work that was being performed at the time Carlin was hurt, and how this work was usually performed, clearly established the fact that the men using the tools were expected to remove them, and to see that they were removed; that Carlin was advised of this fact. The record unquestionably establishes the fact that Welsh, the foreman, had not been using the spike maul, and was not negligent in removing the same after he discovered the approach of a train; that if any negligence existed at all, it was the negligent act of a fellow servant in failing to remove the maul after a train was discovered approaching; that this failure was the proximate cause of the accident to Carlin, and not the failure of Welsh, the foreman to discover it, for he is shown to have exercised all the care that could have been exercised under the circumstances, and there is no proof to show that the maul was in a place where he could have seen it, or where he did see it.

The proximate cause would have been the leaving of the hammer on the track by the fellow-servant of the plaintiff. This being so, then unquestionably the plaintiff must establish, by a preponderance of the evidence, the place where the hammer was, and the failure of the foreman to remove it after he discovered it, or that it was in a place where, if he had discovered it, he could have removed it before it was struck by the train; otherwise, the act of the foreman could not be the proximate cause, but the proximate cause would be the failure of the fellow-servant of Carlin to remove the hammer. In any light that you view the evidence, no right of action would exist in favor of the plaintiff,

for the reason that he has failed to make out his case showing negligence upon the part of the company, or upon the part of the company through its vice-principal.

In our judgment this case is, in principle, on all fours with *Patton vs. The Texas and Pacific Ry. Co., 179 U. S., page 658.*

Mr. Justice BREWER said (p. 663):

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely *(Stokes v. Saltonstall, 13 Pet., 181; Railroad Company v. Pollard, 22 Wall., 341; Gleason v. Virginia Midland Railroad Co., 140 U. S., 435, 443);* **a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence (Texas & Pacific Railway v. Barrett, 166 U. S., 617). Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer it is only one of the many cases in**

which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

These principles are precisely and exactly applicable to the case at bar. We requested their application by the trial Court and our requests were refused and contrary instructions were given. The judgment below should, therefore, we submit, be reversed and a new trial ordered.

Respectfully submitted,

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.